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# The Jury: A Reflection of the Prejudices of the Community

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# NOTE

## THE JURY: A REFLECTION OF THE PREJUDICES OF THE COMMUNITY

### The Heterogeneous Culture

#### Bias in the Culture

The problem of selecting a "fair and impartial" jury recently received front page publicity in the San Francisco Bay Area during the trial of Huey P. Newton, a young black militant accused of murdering a white policeman.[1] Newton and his supporters charged that it was impossible for him to get a fair trial in the American judicial system. One objection was that the jury would be composed not of Newton's "peers" but of middle class whites, with racist attitudes, who would be predisposed to find him guilty. He explained that by a "jury of his peers" he meant not an exclusively black jury, but one consisting of people from and involved in his community, West Oakland, a lower class, primarily black, ghetto. People of similar economic status and language would be able to empathize with him, he felt, while middle and upper class whites would not.[2] Not one of the jury finally impaneled could be classified as a member of Newton's peer group.[3] This jury convicted Newton of voluntary manslaughter, a verdict which was virtually irreconcilable with the testimony.[4] It is felt the conviction was the result of an attitude on the part of the jurors that Newton should not get off scot-free, even though they had not been convinced of his guilt "beyond a reasonable doubt."

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[1] People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968). Huey P. Newton is Minister of Defense of the Black Panther Party, a radical, black militant organization. In addition to murder, CAL. PEN. CODE § 187, he was also charged with assault with a deadly weapon, CAL. PEN. CODE § 245(b) (acquitted), and kidnapping, CAL. PEN. CODE § 207 (dropped).

[2] For a report of Newton's opinions as given at a press conference, see Boyle, *Notes on Jury Selection in the Huey P. Newton Trial*, THE PROGRESSIVE, Oct. 1968, at 29, 34.

[3] *Id.* at 34. Miss Boyle reports that the final jury, including alternates, consisted of one black (a loan officer in a bank), one person of Japanese ancestry, three with Spanish surnames (one a native of Cuba), a cosmetic saleswoman, a second banker, a machinist, two housewives, a bologna slicer, an engineer and property owner, and three employees of, respectively, a food packaging firm, a paper company, and an airline food caterer. *Id.*

Argument on a motion to quash the entire master panel and jury venire and the *voir dire* consumed the first three weeks of the trial. *Id.*

[4] *See, e.g.*, Good, *Verdict on Huey Newton: An Oversupply of Doubt*, NATION, Sept. 30, 1968, at 300.

The bias present in a situation like Newton's can be contrasted with the common bias, most extreme in the South, in favor of a white man suspected of having committed a crime against a black person. Not infrequently, no jury will indict, much less convict, him.[5] In either case, the likelihood of justice going awry—the guilty going free or the innocent being convicted—is magnified because no jury selected by our present methods could possibly be called "impartial." The racist attitudes prevalent in white America today have been well documented.[6] It is not surprising that they also pervade the judicial system, including that "reflection of the conscience of the community," the jury.[7] Where jury deliberations have become known, overt prejudice toward blacks has been revealed.[8]

The existence of this bias places the black criminal defendant in a quandary. The chance of acquittal is generally twice as good before a jury as before a judge, and where juries *do* convict, they tend to convict on a lesser charge and sentence more lightly than a judge would.[9] Yet black people are more likely than whites to be convicted, and of a higher degree of crime;[10] if convicted, they also face more severe punishment.[11] On the other hand, black jurors, for reasons which should not need explanation, tend to favor the underdog.[12] This is not solely a racial phenomenon, but also a socio-economic one; juries of white collar workers (which would include few blacks) are preferred by prosecutors because they are more willing to convict.[13]

Cultural differences—ignorance of mores, language, life styles—compound the jury problem where defendants are not from the predominant socio-economic group, particularly where racial differences are present. One anthropologist tells of a recent homicide trial in which the defendant, the victim, and all witnesses except the police

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[5] L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 292-93 (1967).

[6] *See, e.g.*, NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS REPORT (1968); G. MYRDAL, AN AMERICAN DILEMMA (2d ed. 1962).

[7] Kuhn, *Jury Discrimination: The Next Phase*, 41 So. CAL. L. REV. 235, 245 (1968) [hereinafter cited as Kuhn].

[8] Broeder, *The Negro in Court*, 1965 DUKE L.J. 19, 21-24 [hereinafter cited as Broeder].

[9] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 58-61 (1966).

[10] Broeder, *supra* note 8, at 23.

[11] H. KALVEN & H. ZEISEL, THE AMERICAN JURY 210-11 (1966); G. MYRDAL, AN AMERICAN DILEMMA 550-54 (2d ed. 1962).

[12] Broeder, *supra* note 8, at 29.

[13] *Hearings on Miscellaneous Proposals Regarding the Civil Rights of Persons Within the Jurisdiction of the United States Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess., ser. 16, at 1078 (1966) (testimony of Attorney General Katzenbach); Note, *The Congress, the Court and Jury Selection: A Critique of Titles I and II of the Civil Rights Act of 1966*, 52 VA. L. REV. 1069, 1095 (1966) [hereinafter cited as *The Congress, the Court and Jury Selection*].

were black ghetto residents.[14] Testimony brought out that before the homicide, the person who was killed had "put [the defendant] in the dozens."[15] Defense counsel's efforts to elicit clarification of this phrase were met with prosecution objections, which were sustained, that the witness was not an expert in semantics. As a result, neither judge nor jury learned that the death was a consequence of a "game" of verbal aggression and abusive namecalling, initiated by the deceased against the defendant.[16] In the same trial, when another witness was asked whether he had ever been convicted of a misdmeanor or a felony, he answered in the negative. When asked whether he had ever served time in a correctional institution, he replied, "No, sir, but I was a steward in the merchant marine for twenty years."[17] But when asked about specific convictions, he readily admitted them, and to having been imprisoned. Faced with questions in a vocabulary that was unintelligible to him, he had guessed (incorrectly) at the answers rather than reveal his ignorance of the words used. The jurors decided that the witnesses were either morons or liars, and the resulting verdict was a compromise out of confusion.[18] Other indications of cultural differences such as dress, demeanor, manner of speaking, and attitudes, as well as those of culture alone, also greatly influence jurors.[19]

The problem inherent in these differences is that while our society is culturally heterogeneous, with sharp differences among various groups, our legal system—including the jury system—functions as though we had a homogeneous culture—that of the dominant Anglo-Saxon middle class. The result is built-in prejudice against the culturally different.[20]

**Representation on Juries**

It has been said that the law cannot, as a practical matter, provide juries entirely free of prejudice, and that accordingly, "the defendant's hope and the law's faith have traditionally been that individual biases will somehow cancel each other out, if only the system of selection is fair and the jurors are free from overwhelming external influences."[21] It is the thesis of this note that we are incap-

[14] Brief for D. Swett as Amicus Curiae on Defendant's Motion to Quash the Master Panel, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968) (Built-in Biases in the American Legal System).

[15] *Id.* at 5.

[16] *Id.* at 4-5.

[17] *Id.* at 6.

[18] *Id.* at 5-6.

[19] *Id.* at 12-13.

[20] *Id.* at 4. Jurors themselves have occasionally indicated their awareness of this anomaly; where considering a case involving a black defendant, they have some times expressed a desire to have a black on the jury, or have used any black who perchance was a member, as an "expert" on black ghetto culture. *See* Broeder, *supra* note 8, at 30.

[21] Kuhn, *supra* note 7, at 242.

able even of approaching this lesser goal of balancing the biases, at least in cases involving members of racial and cultural minorities (whether as victims or suspected perpetrators), unless and until our juries adequately represent those minorities. If the primary justification for the use of lay juries is that "they can reflect the conscience and mores of *the community* in applying punitive sanctions to individual cases,"[22] it should also be recognized that "the community" is an amalgam of heterogeneous "sub-communities." As will be shown, however, under present systems of jury selection, lay juries tend to represent only *one* "sub-community," the dominant white middle class.

If our juries "truly" represented, in rough proportion, the various racial, socio-economic and cultural groups within the geographic area from which they were drawn, they would more adequately represent the conscience of *the* community, an amalgam of all its parts. Biases of different groups would have, at most, only the proportional weight they carried within the community. Thus, although prejudices of the dominant class would not be cancelled out, they would at least be rendered less determinative of the verdict and perhaps less inflexible as well, simply because of the presence of minority group members on the same jury. Although a complete absence of biases may not be possible, a proportional representation of all biases is a practical possibility and would be preferable to the present overemphasis given the biases of the majority.

This note will discuss current methods of jury selection, emphasizing the selection of criminal juries in cases that have racial and/or socio-economic overtones, with a critical analysis of the steps commonly involved in such selection. Also given will be a synopsis of the current position of the law and the direction in which it is headed, and an analysis of the Jury Selection and Service Act of 1968.[23] Finally, some partial remedies will be suggested, aimed at accomplishing more proportional representation on our juries of the racial, cultural and socio-economic groups which exist in a given community.

## The Selection Process

Since the method of selecting juries in the state courts is a matter of local law, usually left to the discretion of the local bench to work out within a very general statutory framework, and since there has not been until recently a uniform method of jury selection among the federal courts,[24] the systems used vary widely even within a single state. However, certain general steps are common to all. From

[22] *Id.* at 245 (emphasis added).

[23] 82 Stat. 53 (1968), *amending* 28 U.S.C. §§ 1861-69 (1964). The statute was passed on March 27, 1968 and became effective 270 days later.

[24] Until the passage of the Jury Selection and Service Act of 1968. *See* note 23 *supra.*

some source, a list of prospective jurors is drawn. These people are screened to weed out those who lack the "qualifications" required by local law, those who are "exempt," and those who are "excused." Panels of jurors are selected, generally by lot or some other chance method, from those who remain on the list. Finally, after *voir dire* examination and the exercise of "for cause" and "peremptory" challenges, jurors are selected out of the panel who will actually sit in judgment on the particular case.

**The Population Pool**

It should be apparent immediately that the initial determination of the pool of prospective jurors, the "population" from which the jury list will be drawn, is crucial in determining the nature of the jury that will finally be chosen. Depending upon the definition of "population," it is possible, and indeed most probable, that large groups or classes of people will be automatically excluded from jury service merely because they fail to fall within the definition. To illustrate, if prospective jurors are to be drawn from lists of registered voters, that determination eliminates all those not registered to vote. Obviously, any list of prospective jurors will not be representative of anything other than the "population" from which it is drawn. Thus the more nearly that "population" corresponds to the composition of the entire community, the more representative of that community the jury list will be.

*"Key Man" System*

The determination of the "population" from which prospective jurors will be drawn is almost universally entirely within the discretion of the local jury commissioners.[25] The method most widely used is the so-called "key man" system or one of its variations.[26] Under this system, the jury commissioner selects people from the community ("key men") to recommend others of their acquaintance for jury duty. Since people generally are acquainted primarily with others of similar interests, backgrounds, and socio-economic status, the "key men" will tend to recommend people like themselves. Unless they themselves are representative of all parts of the community, the prospective jurors they recommend will not be either. Since the same generality is likely to be true of the commissioner (that is, the "key men" he selects will tend to come from his own subculture), there is a great tendency towards uniformity of jurors and a con-

[25] *The Congress, The Court and Jury Selection, supra* note 13, at 1076. For a review of state statutes, see *id.* at 1072-76. This is no longer true for the federal courts, since the Jury Selection and Service Act of 1968 has become effective. See text accompanying note 158 *infra.*

[26] Lindquist, *An Analysis of Juror Selection Procedure in the United States District Courts*, 41 TEMPLE L.Q. 32, 33 (1967) [hereinafter cited as Lindquist].

sequent distorted reflection of the community.[27]

One common variation used either exclusively or primarily in a number of judicial districts, is the "key organization" system, where community organizations are requested to supply prospective jurors from their membership lists. Since over half the nation's adult population belongs to *no* voluntary organization, and there are economic, racial, educational and occupational correlations to the joining of organizations, this method is subject to the same criticism of distorted community representation.[28]

The "key man" method and its variations have been the subject of much criticism by legal writers as being productive of "blue ribbon" juries,[29] but generally have been upheld by the courts.[30] In one case, *Cassell v. Texas*,[31] the Supreme Court struck down a jury panel chosen by this system, but only because the jury commissioner admitted that no effort whatsoever had been made to find qualified people in the black community, which in this instance formed a significant portion of the population.[32] The system itself has been judicially condemned only by the Court of Appeals for the Fifth Circuit, and even there only for the federal courts of that circuit.[33]

*Public List System*

After the "key man" system, the second most common method of selecting potential jurors is by using public lists of one type or another—telephone directories, tax rolls, or voter registration lists.[34] The economic discrimination inherent in the first two types of public lists is obvious. Particularly in rural areas, but even in urban areas, poor people are less likely to have telephones. Similarly, tax rolls—especially if real property tax lists (the most common type of municipal taxation) are used—will exclude the poorest segment of the community.

The use of such economically discriminating sources has been held illegal only if some further element of discrimination which is

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[27] Kuhn, *supra* note 7, at 262.

[28] Generally, those who are richer, more educated, employed as white collar workers or professional persons, and the white majority are more likely to belong to voluntary organizations. See Lindquist, *supra* note 26, at 35-36. Of course, the choice of organizations to serve as "sponsors" will also greatly affect the result.

[29] *See, e.g., id.* at 37-47; Kuhn, *supra* note 7, at 260-64.

[30] *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 207-08 (1965); Billingsley v. Clayton, 359 F.2d 13 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966); *cf.* Chance v. United States, 322 F.2d 201 (5th Cir. 1963), *cert. denied*, 379 U.S. 823 (1964); United States v. Hunt, 265 F. Supp. 178, 194-95 (W.D. Tex. 1967); United States v. Duke, 263 F. Supp. 828 (S.D. Ind. 1967).

[31] 339 U.S. 282 (1950).

[32] *Id.* at 287-88.

[33] Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

[34] Lindquist, *supra* note 26, at 34.

overtly based on race is involved. For example, in *Whitus v. Georgia*[35] the Supreme Court found that blacks had been systematically excluded from jury panels. The male population[36] of the county was 42.6 percent black, but only 27.1 percent of the taxpayers (from whom jurors were chosen) were black.[37] In spite of this disparity, the Court did not condemn the use of the tax lists. It merely held that the particular jury list involved was invalid because it was based in part on a previous list that had already been condemned by the Court, and because the race of the black taxpayer was noted on the lists.

The use of voter registration lists must be discussed in more detail; first, because the lists would appear to be nondiscriminatory in the northern and western states, and second, because their use for jury selection purposes has recently been given sanction by the Jury Selection and Service Act of 1968.[38] The use of such lists in the North has been upheld on the grounds that no "cognizable class," *i.e.*, a racial, economic, political or other identifiable group, was shown to have been excluded.[39] In the South, however, it has been recognized that voting lists which are themselves a product of discrimination may not be used.[40]

In 1964, of a voting age population throughout the nation of 114 million, only about 80 million were registered to vote.[41] Residence requirements are the most severe legal restriction upon registration, resulting in an estimated 8 million disenfranchised in 1960.[42] A large

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[35] 385 U.S. 545 (1967).

[36] According to state law, women were qualified but not compelled to serve on juries; they were excused upon request. Whitus v. Georgia, 385 U.S. 545, 550 n.1 (1967), *citing* GA. CODE ANN. § 59-124 (1965).

[37] Out of 33 prospective grand jurors, three were black; one actually served on a grand jury of 19. Of 90 prospective trial jurors, seven were black; none actually served. Whitus v. Georgia, 385 U.S. 545, 550 (1967).

[38] See text accompanying notes 158, 163-64 *infra*.

[39] Gorin v. United States, 313 F.2d 641 (1st Cir. 1963); United States v. Greenberg, 200 F. Supp. 382 (S.D.N.Y. 1961); *cf.* United States v. Bowe, 360 F.2d 1, 7 (2d Cir. 1966) (validity conceded by appellants).

[40] United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71, 78 (5th Cir. 1959); White v. Crook, 251 F. Supp. 401, 404-05 (N.D. Ala. 1966); Harper v. State, 251 Miss. 699, 171 So. 2d 129 (1965).

[41] Lindquist, *supra* note 26, at 47. According to the Gallup Poll, in the 1968 presidential election there were approximately 120 million people of voting age, of whom 72 million (60 percent) voted. By way of comparison, in 1964, 62 percent voted and in 1960, 63 percent voted. Projecting from polls, of the 48 million who did not vote in 1968, 4 million were ineligible because they were aliens or inmates of prisons and mental hospitals; 15 million were registered but were disinterested or did not like the candidates; 10 million could have registered but did not; 7 million were sick or disabled; 5 million were prevented from voting by residence requirements; 3 million were away from home; 3 million said they could not leave their jobs; 1 million failed to obtain absentee ballots. San Francisco Chronicle, Dec. 12, 1968, § T, at 9, cols. 1-2.

[42] Lindquist, *supra* note 26, at 48. In 1968, about 5 million persons were

proportion of these disenfranchised are from lower class cultural minorities, such as migrant farm workers or southern blacks who have recently immigrated to northern cities.[43] Extra-legal restrictions such as intimidation or apathy (which are also related to racial and/or socio-economic status) are largely responsible for the remaining failures to register.[44] "[I]n view of the fact that the lists exclude over 30 million people, a disproportionate number of whom are members of the lowest socio-economic strata of society,"[45] it is doubtful that voter registration lists, without supplementation, are capable of producing representative juries.[46]

The lower proportional voter registration among black people is not a peculiarly southern phenomenon. In the recent trial of Huey Newton, there was expert testimony to the effect that *all* recent studies of voting and voter registration, in the North as well as in the South, have shown that "poor persons and black persons and especially poor black persons are much less likely to register to vote . . . than are white persons or wealthy persons and especially white wealthy persons."[47] Evidence introduced in the trial concerning urban Alameda County, California, showed that while the county-wide registration rate of eligible voters was 82 percent, the registration rate in West Oakland, the predominately lower class black community in which the defendant was raised and lived, was 52.5 percent.[48] In

disenfranchised by this method. San Francisco Chronicle, Dec. 12, 1968 § T, at 9, cols. 1-2 (Gallup Poll). Residence of one year is required by 34 states and two years is required by Mississippi. Lindquist, *supra* note 26, at 48.

[43] *Cf.* BUREAU OF THE CENSUS, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1966, at 3 (Population Reports, Series P-20, No. 174, 1968).

[44] *See* Lindquist, *supra* note 26, at 48. In the South only 28-39 percent of the eligible population is registered. *Id.*

[45] *Id.* at 49.

[46] *Id.*

[47] Record, vol. 1, at 260, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968) (testimony of sociologist Sheldon Messenger).

[48] Exhibit in Support of Defendant's Motion to Quash the Master Panel, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968). The following is a replica of the exhibit:

ANALYSIS OF CURRENT VOTING REGISTRATION IN ALAMEDA COUNTY

| Selected Areas of Alameda County | 1 Percentage of Population Negro | 2 Number of Persons 21 or Older | 3 Number of Registered Voters | 4 Rate of Registration (Col. 3/Col. 2) |
|---|---|---|---|---|
| Total: Alameda County | 12.4 | 569,183 | 466,905 | 82.0 |
| West Oakland[a] | 71.3 | 20,680 | 10,862 | 52.5 |
| South Oakland[b] | 80.0 | 4,581 | 3,443 | 75.2 |
| Montclair[a] | 0.05 | 11,575 | 9,698 | 83.6 |
| Hayward[b] | 0.1 | 38,723 | 32,293 | 83.4 |
| San Leandro[b] | 0.02 | 39,957 | 32,995 | 82.6 |
| Total Alameda County Negro Population | | | (approx.) | 60.0 |

a. Figures for these areas are taken from Exhibit Y in People v. Craig, No.

contrast, suburban Montclair, with a black population of .05 percent, had the highest registration rate in the county with 83.6 percent.[49]

A sociologist testified in the Newton trial that the primary reason for the difference in registration rates was that

> low income people in general, and more specifically, the Negro population is more apathetic vis-a-vis the political process. It is a case of having less to gain from the political process. . . . [T]he political system . . . has been historically and remains contemporarily, although perhaps in a reduced amount, a relatively closed and foreign apparatus vis-a-vis the Negro population.[50]

He estimated that the overall registration rate of black adults was 60 percent.[51] Under circumstances like these, it is difficult to understand how one California court, while acknowledging that in its particular area the registration rate of blacks was 23 percent less than that of other racial groups, could state that the use of voter registration lists was not *"inherently"* discriminatory because qualifications and desire to register are factors "neutral to . . . national, racial or economic origin."[52] According to the court, the fact that blacks tend proportionally to register less than others was *"irrelevant"* to the defendant's right[53] to have a jury drawn from a fair cross section of the community.[54]

### Notice

Regardless of the source from which the names of prospective jurors are drawn, the next step in the selection process is to send out notices to a given number,[55] asking them to complete forms establishing their "qualifications" and availability for jury service. Failure to follow up on the people who do not respond to the initial mailing is another cause of the disproportionate exclusion of the black and the poor. In the Huey Newton trial there was testimony that

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41750 (Super. Ct., Alameda County, Cal., April 18, 1968).

b. Figures for these areas are derived from the collowing sources: Columns 1 and 2 are taken from BUREAU OF THE CENSUS, U.S. CENSUS OF HOUSING AND POPULATION: 1960 FINAL REPORT PUC (1)-137 (1966) (census track for San Francisco-Oakland). Column 3 is from the Registrar of Voters as of April 25, 1968.

[49] Exhibit in Support of Defendant's Motion to Quash the Master Panel, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968).

[50] Record, vol. 1, at 88, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968) (Assistant Professor Dizard, University of California, Berkeley).

[51] *Id.* at 89.

[52] People v. Tripp, No. CR 14790, at 2-3 (Super. Ct., San Diego County, Cal., Nov. 1, 1968).

[53] For an analysis of this right see Fay v. New York, 332 U.S. 261, 299-300 (1947) (dissenting opinion); People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954).

[54] People v. Tripp, No. CR 14790, at 3 (Super. Ct., San Diego County, Cal., Nov. 1, 1968).

[55] Selected haphazardly, although perhaps weighted to balance the sexes.

the poor, and particularly the black poor, are more likely to move to an unknown address, to move out of the county, or to fail to respond for some other reasons than are whites or the relatively wealthy.[56] This was borne out by the evidence, which showed that of those to whom a notice of jury duty was sent, almost twice as many people from the ghetto community as compared to the white suburban community were eliminated because they failed to respond.[57]

**The "Unqualified"**

The third step in the selection process is the elimination of "unqualified" persons.[58] The required "qualifications" may be either objective (for example, being at least 21 and meeting residency requirements),[59] or subjective (for example, possessing "ordinary intelligence"[60] or being of "good character"). Either kind might be unduly discriminatory; the former by automatically excluding significant population segments, and the latter by giving the jury commissioner broad discretion, thereby permitting the exercise of any biases he may have.

The socio-economic discrimination inherent in objective residency requirements has already been noted in connection with the use of voter registration lists.[61] Another common type of objective disqualification is one against people with prior felony convictions,[62] although as Lawrence Speiser of the American Civil Liberties Union has pointed out, many times the people on trial are "the failures, the repeated failures, and . . . it would be desirable to have individuals [on the jury who, also being 'failures,'] perhaps would have a better understanding of the pressures, the problems . . . [of ghetto] situations. . . ."[63]

A third common criterion is one of minimum economic status. In New York, for example, a prospective juror must own at least two hundred and fifty dollars of personal property.[64] The discrimination here is apparent.

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[56] Record, vol. 1, at 256-57, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968).

[57] *Id.* at 257.

[58] Drawing up a list of prospective jurors and eliminating the "unqualified" may be combined in one step, as where the key man system is such that those who make the recommendations select only "qualified" people.

[59] *See, e.g.*, CAL. CODE CIV. PROC. § 198.

[60] CAL. CODE CIV. PROC. § 198.

[61] See text accompanying note 33 *supra.*

[62] *See, e.g.*, CAL. CODE CIV. PROC. § 199(2).

[63] *Hearings on S. 3296, Amendment 561 to S. 3296, S. 1497, S. 1654, S. 2845, S. 2846, S. 2923 and S. 3170 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess., at 1132-33 (1966).

[64] N.Y. JUDICIARY LAW § 504(3) (McKinney 1964); *see* Fay v. New York, 332 U.S. 261 (1947) (similar statute upheld). Economic status is frequently a nonstatutory qualification, as where tax rolls are used as the source of prospective jurors. See text accompanying notes 34-37 *supra.*

The use of subjective qualifications was considered by the Supreme Court in *Fay v. New York*.[65] In that case the so-called "blue ribbon" jury was upheld because the application of subjective standards—being intelligent, well-informed and literate in English—did not, according to the Court, result in the intentional exclusion of a recognizable class.[66] The application of subjective standards like "intelligence," "judgment," and "character" invariably will be discriminatory to the degree that the jury commissioner's or the "key man's" conception of those qualities is determined by his own educational, moral and socio-economic status. Moreover, the belief is widespread that the above listed qualities are rare among black people, not only because of less favorable educational and environmental influences, but also because of inherent shortcomings.[67] Additionally, subjective qualifications are sometimes given a veneer of nondiscriminatory application, as in the use of "objective" tests to measure "ordinary intelligence." Such a test was the reason for a recent dismissal of a jury panel in Alameda County because the test in question measured middle-class mores and vocabulary rather than intelligence.[68] The failure rate on the test was 14.5 percent in a white suburban community and 81.5 percent in a predominately black, lower class community.[69] The court refused to believe that "81.5% *of the registered voters* in a large section of Oakland are below the level of 'ordinary intelligence.' "[70]

**The "Exempt" and the "Excused"**

Some people are *exempt* from liability for jury duty by statute, usually because of their occupation.[71] Others are *excused*, generally

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[65] 332 U.S. 261 (1947).

[66] *Id.* at 290-92.

[67] Kuhn, *supra* note 7, at 268.

[68] People v. Craig, No. 41750 (Super. Ct., Alameda County, Cal., April 18, 1968). The court also considered the question whether the limitation of the jury panel to registered voters was itself too narrow, but decided that the percentage of adults otherwise qualified for jury service who failed to register in Alameda County "is probably small . . . since intensive voter registration drives take place before each state and national election and no group is discouraged from registering or voting." *Id.* at 8. However, no evidence on the issue was before the court. Defendant's Motion to Quash the Master Panel 8, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968).

[69] People v. Craig, No. 41750, at 5 (Super. Ct., Alameda County, Cal., April 18, 1968).

[70] *Id.* at 7 (emphasis in the original).

[71] *See, e.g.*, CAL. CODE CIV. PROC. § 200, which exempts, among others: Holders of public office; members of the Armed Forces while on active duty; teachers, physicians and dentists; telegraph and telephone company employees; attorneys, their clerks and secretaries; ministers; and persons who have recently performed jury duty. An exemption must be claimed by the person entitled to it. *See, e.g.*, CAL. CODE CIV. PROC. § 202.

on the basis of economic or physical hardship.[72] Usually the jury commissioner has the discretionary power to grant excuses, although he may be subject to judically determined procedures or rules.[73] Since the usual excuse is for financial hardship, the exercise of the commissioner's discretion commonly results in the exclusion of a disproportionate number of poor people, and therefore of blacks and other racial minorities.[74] The practice of systematically excusing *all* daily wage earners has been prohibited in the federal courts,[75] and the prohibition was recently extended by the Fifth Circuit to the state courts.[76] However, such decisions have curtailed the discriminatory effects of the discretion to grant excuses only in one flagrant form. The courts—while regretting that stipends for jury service are insufficient—have generally exercised little control over standards used to determine hardship, and have accepted unquestioningly the resultant economic and therefore, generally racial, discrimination.[77]

**The Voir Dire**

From the resulting list of qualified jurors (those from the original notified "population" not disqualified, exempt, or excused), some

[72] *See, e.g.*, CAL. CODE CIV. PROC. § 201.

[73] *See, e.g.*, CAL. CODE CIV. PROC. § 201(a). Judicial standards established in Alameda County permit hardship excuses for: Wage earners who are not paid while on jury duty and who have more than two children and a spouse who does not work; unemployed women with small children and no child care; and the operators of small businesses. Record, vol. 1, at 25-27, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968). The court itself, rather than the commissioner, will grant excuses under other circumstances.

[74] In People v. Tripp, No. CR 14790 (Super. Ct., San Diego County, Cal., Nov. 1, 1968), the court granted defendant's motion to quash the petit jury panel. The court found that the commissioner departed from the statutory scheme in granting hardship excuses "for slight or trivial causes." *Id.* at 5, *citing* CAL. CODE CIV. PROC. § 201. This resulted in the use of standards that were "objectionably vague and subconscious," which effectively eliminated several large classes in the community, principally the unemployed, the impoverished, and the blue collar worker. People v. Tripp, *supra* at 5. The court also found that a prima facie case of discrimination had been established by showing that blacks comprised five per cent of the registered voters but less than one per cent of the jury panel; the presumption of discrimination was not overcome by the evidence, which showed that the disparity was related to the departure from the statutory standards governing economic hardship of jurors. *Id.* at 6.

[75] Thiel v. Southern Pac. Co., 328 U.S. 217 (1946). The Supreme Court based its decision on its supervisory power, but said that the exclusion "cannot be justified by federal or state law." *Id.* at 222.

[76] Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967). See further discussion of case in text accompanying notes 134-39 *infra*.

[77] *See, e.g.*, United States v. Leonetti, 291 F. Supp. 461, 474-76 (S.D.N.Y. 1968). *But see* People v. Tripp, No. CR 14790 (Super. Ct., San Diego County, Cal., Nov. 1, 1968).

number is summoned for service on a particular panel. Prospective jurors are then subjected to a voir dire examination, which is intended to eliminate from the jury any who have preconceptions which will affect or prevent an unbiased judgment of the particular facts of the case. During the voir dire a prospective juror may be challenged by the court or by counsel, and thereby excused.[78] Challenges for cause may be made on the grounds either of implied bias—where an inference of bias is drawn from the existence of a relationship or other connection between the juror and an element of the case such as a party—or of actual bias—where the juror admits to a state of mind which would prevent him from being impartial.[79] The fact that the prospective juror admits to prejudice or bias is not necessarily sufficient to sustain a challenge for cause: If he asserts convincingly that he can overcome his feelings and judge the case with an open mind, the challenge is not allowed.[80]

The use of challenges for cause is hopelessly incapable of protecting the culturally or racially different criminal defendant from the racial prejudices of the jurors, the bulk of whom are drawn from the dominant white middle class. At the heart of the problem is the virtual impossibility of getting people to state their biases in the public voir dire. Most are reluctant to admit prejudice in the presence of strangers;[81] others are not consciously aware of their racist attitudes, or underestimate the impact of them on their ability to be objective.[82] The fact that in our society most if not all white people either consciously or unconsciously have attitudes of superiority toward other racial groups[83] has led one authority to state that the only way to eliminate white racism from a criminal case involving racial issues would be to have a jury of only black people, "a jury that would [in] the sociological sense . . . be a jury of the peers of the defendant."[84]

Peremptory challenges[85] are equally incapable of eliminating jurors with racist attitudes. While challenges for cause, used to excuse the rare juror who confesses to unalterable prejudice, are unlimited in number, the number of peremptory challenges which might be

[78] Schuck, *Selection of a Jury*, in CALIFORNIA CIVIL PROCEDURE DURING TRIAL 93, 113 (Cal. Cont. Educ. Bar ed. 1960).

[79] Title, *Voir Dire Examination of Jurors in Criminal Cases*, 43 CAL. ST. B.J. 70, 71-74 (1968).

[80] *Id.* at 81.

[81] Record, vol. 1, at 223, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968).

[82] Kuhn, *supra* note 7, at 243-44.

[83] Record, vol. 1, at 283, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968). *See generally* NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS REPORT (1968).

[84] Record, vol. 1, at 285, People v. Newton, No. 41266 (Super. Ct., Alameda County, Cal., Sept. 27, 1968).

[85] Some system of peremptory challenges is common to almost all jurisdictions.

used to eliminate those only suspected of racism is limited.[86] And because of the pervasiveness of racial prejudice, the excused juror is more than likely to be replaced by another with similar racial attitudes. However, where only a few minority members are on the jury panel, the peremptory challenge *is* an effective tool for eliminating *them*. It thus becomes an efficient device for the preservation of all-white juries.[87]

The use of peremptory challenges in this way by the prosecution has been the subject of many appeals,[88] only one of which has reached the United States Supreme Court. In *Swain v. Alabama*,[89] defense counsel showed that in the jurisdictional district no black person had survived the exercise of peremptory challenges over a fifteen year period, although blacks comprised 26 percent of the population and 10 to 15 percent of the jury panels. In a six to three decision, the Court held that the petitioner had failed to sustain the burden of proving that blacks were systematically excluded through the use of the challenges. Although a prima facie showing of discrimination would have been made had the discrepancy between blacks in the population and on the jury panels been sufficient,[90] such a prima facie rule of exclusion was not applicable to the peremptory

[86] Where racial prejudice is "acceptable" to the community, defense counsel may do his client more harm than good by challenging an overtly biased venireman, even though he might be replaced by one less biased. Kuhn, *supra* note 7, at 244.

[87] The manner in which blacks are totally eliminated from final juries because they constitute such a small percentage of the panels, even though the community has a large black population, has been demonstrated in many cases. *See* Swain v. Alabama, 380 U.S. 202 (1965); Watkins v. State, 199 Ga. 81, 33 S.E.2d 325 (1945); State v. Barksdale, 247 La. 198, 170 So. 2d 374 (1964), *cert.* denied, 382 U.S. 921 (1965).

[88] *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Watkins v. State, 199 Ga. 81, 33 S.E.2d 325 (1945); State v. Barksdale, 247 La. 198, 170 So. 2d 374 (1964), *cert. denied*, 382 U.S. 921 (1965).

[89] 380 U.S. 202 (1965). For criticism of the case, see L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 291-92 (1967); Kuhn, *supra* note 7, at 283-87; Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966) [hereinafter cited as Comment, *Swain v. Alabama*]; 75 YALE L.J. 322 (1965).

[90] The Court found that blacks were underrepresented by ten percent, an insufficient disparity for a prima facie case. 380 U.S. at 208-09. The deceptiveness of the Court's finding is apparent: the ten percent figure was apparently arrived at by subtracting ten to fifteen percent from twenty-six percent; but black representation on jury panels was in fact about fifty percent less than their proportion in the population (10-15 percent on panel/26 percent of population = ½ = 50 percent). See Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 346 & n.34 (1966); Kuhn, *supra* note 7, at 252. Criticism of the Supreme Court's mathematics is implied in Rabinowitz v. United States, 366 F.2d 34, 56 n.55 (5th Cir. 1966).

challenge procedure.[91] Rather, in order to satisfy the state action requirement of the equal protection clause, the defense would be required to show "when, why and under what circumstances"[92] the prosecution had removed blacks in the past.[93] A complementary ruling was that with respect to peremptory challenge cases, as with discriminatory selection of jury panels, equal protection would not apply to a particular case but only to a course of conduct over a period of time.[94] In short, *Swain* says that peremptory challenges are not subject to judicial scrutiny, and their use against those suspected of sympathy with an adverse party is common, legitimate, and beyond the reach of the equal protection clause in any given case.[95]

The impact of *Swain* is to isolate effectively from judicial review a device susceptible of extraordinarily efficient use, to perpetuate a totally white jury system in the South, and to prevent racially balanced juries in the North in cases in which race is an issue.[96] The basic supposition of the Court seems to be that the removal from jury panels of blacks who might possibly be sympathetic to a black defendant will result in their being replaced by jurors more probably impartial, albeit white.[97] The fallacy here is that, as previously noted, an all white jury is not neutral towards a black defendant, but hostile —particularly if the victim of the alleged crime is white.[98]

The Court's naiveté about racial attitudes also reveals itself in the requirement that the prosecution alone be shown to have been responsible for the systematic exclusion of blacks through the exercise of peremptory challenges. This burden is not only virtually insuperable, but also unjustifiable.[99] The requirement ignores the pervasiveness of racism throughout the legal system, for which state action is responsible since the state establishes and operates the legal system.[100]

A further result of *Swain* is that the use of peremptory challenges is given greater protection than the constitutional prohibition of discrimination.[101] Yet there is no constitutional right to peremptory challenges.[102] Where a constitutional claim conflicts with a nonconstitutional claim, the latter must yield.[103] Additionally, the

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91 Swain v. Alabama, 380 U.S. 202, 227 (1965).

92 *Id.* at 226.

93 *Id.*

94 *Id.* at 221-22.

95 Kuhn, *supra* note 7, at 285.

96 *See* Comment, *Swain v. Alabama*, *supra* note 89, at 1174-75.

97 *See* Kuhn, *supra* note 7, at 286-87.

98 See text accompanying notes 1-20 *supra.*

99 *See* Comment, *Swain v. Alabama*, *supra* note 89, at 1161-63.

100 *See* Kuhn, *supra* note 7, at 296.

101 *Accord*, Hall v. United States, 168 F.2d 161 (D.C. Cir.), *cert. denied*, 334 U.S. 853 (1948).

102 Stilson v. United States, 250 U.S. 583, 586 (1919).

103 Swain v. Alabama, 380 U.S. 202, 244 (1965) (dissenting opinion).

peremptory challenge appears to have developed as a protection for the defendant,[104] and therefore should not be available to assist the prosecution at the expense of other rights of the defendant.

The basis of the peremptory challenge is not that the challenge is without reason, but that the reason need not be made known.[105] This rationale could be preserved for most cases, yet yield to constitutional protection from discrimination, if the use of the challenge could be questioned when it gave rise to a reasonable inference of discrimination.[106] If challenges were consistently exercised against racial minorities in a case with no racial implications, their use presumably would not meet the test that racial classification must be shown to be "necessary to the accomplishment of some permissible state objective."[107] It would therefore be a denial of equal protection per se. If, on the other hand, race was relevant to the case being tried, consistent challenges of minority members would be subject to review, though not impermissible per se.

Challenges on strictly racial grounds would have to be distinguished from those for other, permissible reasons. A black jury member could still be challenged, for example, because he had the same kind of job as the defendant. However, a challenge solely on racial grounds would have the effect of replacing a possibly friendly juror with a probably hostile one. "It cannot be consistent with equal protection and with the principles of fair jury selection to permit the state to eliminate one element in the population deemed friendly to the defense in favor of another presumably hostile in precisely those cases where this disadvantages members of the minority race."[108]

This approach would require a change of the present rule, which does not allow the defendant to question the composition of his own particular jury, apart from past juries. But it is clear that even the prima facie rule of exclusion, if it were applied to the use of peremptory challenges, would be inadequate protection. The prosecution could easily avoid the rebuttable presumption of discrimination shown by the absence of black jurors over a period of time by keeping a few "safe" "Uncle Toms"[109] on the juries or by allowing blacks to sit unchallenged where race was irrelevant. The only effective safeguard against such "tokenism" is to allow the defendant

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[104] *See* Comment, *Swain v. Alabama, supra* note 89, at 1170-73. *But cf.* Swain v. Alabama, 380 U.S. 202, 219-20 (1965).

[105] Note, *Peremptory Challenge—Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157, 160 (1967).

[106] *See* Kuhn, *supra* note 7, at 294; *cf.* Hall v. United States, 168 F.2d 161 (D.C. Cir.), *cert. denied*, 334 U.S. 853 (1948).

[107] Loving v. Virginia, 388 U.S. 1, 11 (1967).

[108] Kuhn, *supra* note 7, at 291.

[109] So-called by the Attorney General of Alabama, speaking of the blacks who helped acquit Eugene Thomas of the murder of Viola Liuzzo (a white civil rights worker killed in the South). *Id.* at 271.

to challenge the use of peremptories in his own case.[110]

The voir dire, with its peremptory and for cause challenges, is the last step in selecting the jury that will be impanelled to decide a particular case. As has been seen, the usual process begins with the definition of the population from which all prospective jurors will come. A group selected from that "population" is notified of possible jury service, and those who respond are screened to eliminate the "unqualified." Qualified jurors may claim an exemption or be excused either before or after being drawn to sit on the panel. This panel then will be subjected to the voir dire. Each step of the process is fraught with possibilities for discriminating, intentionally and unintentionally, against the less educated, the less fortunate, the less wealthy portions of the population—with their disproportionate numbers of racial minorities. The result is that few, if any, of our juries even approach being representative of the communities from which they are drawn.[111]

## The Law—Its Status and Trends

### The Case Law

Now that the common methods of jury selection have been analyzed, the current status of the law and its discernible trends can be further explored. Since juries in state courts are a matter of state law and a study of each state is beyond the scope of this note, discussion of legal controls on these juries will be confined to federal limitations on the exercise of the state's power. Juries in the federal system are subject to the supervisory powers of the federal appellate courts, as well as to constitutional and congressional control. Following a discussion of case law, the most recent congressional pronouncement, the Jury Selection and Service Act of 1968, will be analyzed.

#### *The "Systematic Exclusion" Rule*

The United States Supreme Court first enunciated a constitutional right to jury selection free from racial discrimination in 1879, when it held that the jury provisions of the Civil Rights Act of 1875 were constitutional under the 13th and 14th amendments.[112] From

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110 *See id.* at 303; Comment, *Swain v. Alabama, supra* note 89, at 1173-74.

111 The reader is probably well aware that certain types of discriminatory jury selection are being ignored in this note, such as the discrimination which eliminates a disproportionate number of young people. They are outside the scope of this paper; there is no intent to slight their existence or importance.

112 *Ex parte* Virginia, 100 U.S. 339 (1879); Strauder v. West Virginia, 100 U.S. 303 (1879). The Civil Rights Act of 1875 provided, and still provides, that no otherwise qualified citizen "shall be disqualified for service as grand

this beginning developed the rule that the "systematic exclusion" of racial minorities from state jury panels was a denial of equal protection of the laws.[113] As a corollary, the Supreme Court developed the so-called "prima facie" rule: Where there is a *significant* disparity between the proportion of a racial group *chosen for jury duty* and the proportion of that group in the *eligible* population, the state has the burden of rebutting the presumption that racial discrimination is the cause.[114] As has been noted, the Court declined to extend the prima facie rule to the use of peremptory challenges.[115] The effect is that so long as the proportion of blacks (or other racial groups) on the panel is not too far out of line with their numbers on the lists from which jurors are to be chosen,[116] it makes no difference that none have in fact served on juries.

The theory underlying the systematic exclusion rule has been that when a traditionally oppressed group is arbitrarily excluded from serving on juries, the probability of prejudice to a defendant belonging to that group is so great as to make a showing of actual prejudice unnecessary.[117] The rule therefore clearly applies where the defendant and the excluded jurors all belong to a class traditionally subject to prejudice and oppression.[118] This has led some courts to adopt the so-called "same class" rule, requiring a showing of actual prejudice where the defendant does not belong to an oppressed class himself, or where the excluded class is different from his own.[119] Other courts have rejected the rule.[120] The Supreme

or petit juror" in any state or federal court because of "race, color, or previous condition of servitude." 18 U.S.C. § 243 (1964).

[113] *E.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Norris v. Alabama, 294 U.S. 587 (1935).

[114] *See, e.g.*, Swain v. Alabama, 380 U.S. 202 (1965); Norris v. Alabama, 294 U.S. 587 (1935); *cf.* Hernandez v. Texas, 347 U.S. 475 (1954); Patton v. Mississippi, 332 U.S. 463 (1947); Smith v. Texas, 311 U.S. 128 (1940); Neal v. Delaware, 103 U.S. 370 (1880).

What constitutes a "significant" disparity has not been made clear, although in most cases where the Supreme Court has found such a disparity the exclusion of the racial group has been virtually total. *See* Kuhn, *supra* note 7, at 252-54. So far, the Supreme Court has not held unconstitutional any given method of defining the "eligible population," so long as it does not expressly exclude members of a particular racial group. See text accompanying notes 25-54 *supra*.

[115] Swain v. Alabama, 380 U.S. 202 (1965).

[116] See note 114 *supra*.

[117] Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, 300-01.

[118] *See* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954).

[119] *The Congress, the Court and Jury Selection*, *supra* note 13, at 1097-98.

[120] *E.g.*, Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964) (white civil rights worker allowed to challenge exclusion of blacks); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965) (white civil rights worker); *cf.* State v. Madison, 240 Md. 265, 213 A.2d 880 (1965) (defendant who believed in God

Court has never applied it,[121] but neither has the Court applied the systematic exclusion rule in favor of a person who did not belong to the excluded class.[122]

*The "Cross Section" Rule*

The systematic exclusion rule and its corollaries, based on the equal protection clause, until recently have been the major limitations imposed on state jury selection methods by federal law.[123] In the federal court system, however, the rule has prevailed that a jury must be drawn from a group which represents a "cross section" of the community:

> [T]here is a constitutional right to a jury drawn from a group which represents a cross-section of the community. And a cross-section of the community includes persons with varying degrees of training and intelligence and with varying economic and social positions. Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy or the most successful, nor of the least intelligent, the least wealthy, or the least successful. It is a democratic institution, representative of all qualified classes of people.[124]

The "cross section" rule was first applied by the Supreme Court

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allowed to challenge exclusion of jurors who refused to state a belief in God).

[121] In Fay v. New York, 332 U.S. 261, 287 (1947), the Court discussed the rule without apparent disapproval.

[122] For criticism of the same-class rule, see Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, 300-01; Comment, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 920-23 (1965).

The question has been asked in reverse: May there be systematic *inclusion* of minority groups? The Supreme Court has not ruled on the issue, having avoided it in both Akins v. Texas, 325 U.S. 398 (1945), and Cassel v. Texas, 339 U.S. 282 (1950). The fifth circuit held that systematic inclusion was constitutional in Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967), *overruling* Collins v. Walker, 329 F.2d 100 (5th Cir. 1963), *aff'd on rehearing*, 335 F.2d 417 (5th Cir.), *cert. denied*, 379 U.S. 901 (1964). The court said in *Brooks* that the constitutional requirement that a jury represent a cross section of the community compelled the consideration of race, although this could not be permitted as a means of discrimination or to secure proportional representation or a predetermined or fixed limitation. 366 F.2d at 24.

*Brooks* is actually a due process case, which belongs with the discussion which follows. See text accompanying notes 146-49 *infra*. Whether the limitations it puts on the consideration of race are necessary, desirable, or even capable of being applied, should be considered.

[123] The due process clause of the Fourteenth amendment forbade only trial by a jury that was not impartial. Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, 299-300, *citing Moore v. Dempsey*, 261 U.S. 86 (1923).

[124] Fay v. New York, 332 U.S. 261, 299-300 (1947) (dissenting opinion).

in *Glasser v. United States*,[125] and further developed in *Thiel v. Southern Pacific Company*,[126] a 1946 case which held that the systematic exclusion of all daily wage earners from federal juries was unlawful. By imposing this rule on federal courts alone, the Supreme Court has treated racial and socio-economic discrimination as separate phenomena, requiring that federal courts be free of both while the state courts need rid themselves of only the most overt kind of racial discrimination. Thus, while the requirement that juries represent a cross section of the community has been ostensibly applied to *racial* exclusion in state courts,[127] the Supreme Court declined to apply it in a *socio-economic* context to a state "blue ribbon" jury in *Fay v. New York*.[128] The Court in actuality has applied only the systematic exclusion rule, a basically different concept, to the states, and even then only in a racial context.[129] The Court of Appeals for the Fifth Circuit, however, in a series of 1966 en banc decisions,[130] applied the "cross section" rule to juries in both the state and federal systems, and to both racial and socio-economic exclusion.

As the above quoted language suggests, the "cross section" rule is basically a due process doctrine, as opposed to the systematic exclusion rule, which is based upon equal protection. Thus in *Thiel*[131] (a cross section case), although the Supreme Court did not consider

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125 315 U.S. 60 (1942). In that case, the Court held unlawful the practice of selecting jurors from lists supplied by public service organizations which conducted a jury service training program.

126 328 U.S. 217 (1946) (supervisory power).

127 *E.g.*, Smith v. Texas, 311 U.S. 128 (1940).

128 332 U.S. 261 (1947).

129 Some states have adopted the cross section doctrine on their own, although it is not clear to what extent. *See, e.g.*, People v. White, 43 Cal. 2d 740, 754, 278 P.2d 9, 18 (1954), *cert. denied*, 350 U.S. 875 (1955); State v. Ferraro, 146 Conn. 59, 147 A.2d 478 (1958), *cert. denied*, 369 U.S. 880 (1962); Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964); State v. Lowry, 263 N.C. 536, 139 S.E.2d 870 (1965).

In the California case, the conviction was not reversed because there was no showing of prejudice to the defendant as required by the state constitution. People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954) (CAL. CONST. art. 6, § 4½). *But see* People v. Craig, No. 41750 (Super. Ct., Alameda County, Cal., April 18, 1968); People v. Tripp, No. CR 14790 (Super. Ct., San Diego County, Cal., Nov. 1, 1968) (no showing of actual prejudice required).

Exclusion of both racial and economic classes has become an issue in a current California trial which promises to become notorious, the trial of Sirhan B. Sirhan for the murder of Senator Robert Kennedy. Defense counsel argued a motion to quash the indictment, on the grounds that racial and economic classes were systematically excluded from the grand jury that brought it in. San Francisco Chronicle, Jan. 30, 1969, at 6, cols. 6-7; San Francisco Chronicle, Jan. 31, 1969, at 11, cols. 1-2.

130 Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967); Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

131 Thiel v. Southern Pac. Co., 328 U.S. 217 (1946).

wage earners to be a class traditionally subject to discrimination and oppression, it held that a showing of actual prejudice was not required as it would have been under equal protection.[132] Also in *Thiel*, the petitioner's claim was recognized though he himself was not a member of the excluded class.[133]

The Court of Appeals for the Fifth Circuit was even more explicit in *Labat v. Bennett*,[134] a habeas corpus proceeding. The court held that where the records revealed a systematic exclusion of daily wage earners, the black defendants in a *state* prosecution were deprived of an impartial jury in violation of both due process and equal protection because the jury did not represent a cross section of the community. The court declined to base its holding solely on racial discrimination, although it noted that the excluded group, in violation of the equal protection clause, encompassed a large portion of the black community.[135] The court said:

> This exclusion [of daily wage earners] also goes to the fairness of the trial. The "very integrity of the fact-finding process" depends on impartial venires representative of the community as a whole. The undermining of the jury system's fact-finding process, the opportunity for unfairness, the risk that defendants who may be daily wage earners will be prejudiced by exclusion of jurors in the same class are dangers which would compel condemnation of the practice without the necessity of the court's finding actual prejudice affecting the outcome of the case. In this situation, as in the straight-out exclusion of Negroes, "the degree of prejudice can never be known."[136]

As noted above, the Supreme Court had declined to apply the "cross section" rule to state jury systems in *Fay v. New York*.[137] Although purporting to distinguish *Fay* on factual grounds, the *Labat* court in fact rejected both its restrictive approach and its requirement of a showing of actual prejudice. The court also removed, at least impliedly, any necessity for the excluded class to be traditionally oppressed. Furthermore, the court cited with approval state court decisions in which defendants had successfully challenged the exclusion of classes to which they themselves did not belong,[138] indicating that the fifth circuit will allow *any* defendant to challenge a jury selection process which excludes representation from significant community groups. The effect of *Labat* is to elevate claims for equitable jury selection procedures from restrictive equal protection considerations to due process rights.[139]

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[132] *Id.* at 225.

[133] For the relationship of the "same class" rule to the equal protection clause, see text accompanying notes 117-22 *supra*.

[134] 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967).

[135] *Id.* at 720.

[136] *Id.* at 723.

[137] 332 U.S. 261 (1947). See text accompanying note 128 *supra*.

[138] 365 F.2d at 723, *citing* Allen v. State, 110 Ga. App. 56, 137 S.E.2d 711 (1964); State v. Madison, 240 Md. 265, 213 A.2d 880 (1965). See note 120 *supra*.

[139] *See* Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, 302.

The results are strikingly different when jury selection procedures are treated as a matter of due process rather than equal protection.[140] The due pocess claim includes the equal protection claim, but goes much farther.[141] If having a jury which represents a cross section of the community goes to the fundamental fairness of the trial, the state has an *affirmative duty* under the due process clause to provide such a jury.[142] The equal protection claim, however, is denied if state action cannot be shown.[143] Because of the requirement that prejudice be shown except where the defendant belongs to a traditionally oppressed class, the equal protection claim is highly individualized, with limited value as precedent if upheld. A procedural due process claim which is accepted, however, is equivalent to a determination that the possibility of prejudice to *any defendant* receiving the same treatment is too great to be tolerated. Of course, the "same class" rule has no place in the "cross section" doctrine as based on the due process clause, because *every* defendant has the right to a representative jury.[144]

It is true that the courts have not yet defined "representative of a cross section of the community" to mean *proportional* representation; indeed, the cases have said that the defendant is *not* entitled to proportional representation.[145] However, it is submitted that the refusal to require proportional representation is neither necessary nor desirable. First, Supreme Court cases which have indicated that there is no right to proportional representation have considered the equal protection clause determinative, and can therefore be distinguished from attempts to define procedural due process rights. Second, as was recognized by the fifth circuit in *Brooks v. Beto*,[146] the cross section requirement *compels* consideration of race. Holding that the deliberate *inclusion* of some blacks on jury panels was not unlawful, the court noted that the Constitution must be color conscious, as well as color blind, to prevent discrimination from being perpet-

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[140] *See generally* Kuhn, *supra* note 7; Note, *Jury Challenges, Capital Punishment, and Labat v. Bennett: A Reconciliation*, 1968 DUKE L.J. 283, 301-02; Comment, *The Defendant's Challenge to a Raical Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 938-39 (1965).

[141] Comment, *The Defendant's Challenge to a Racial Criterion in ury Selection: A Study in Standing, Due Process and Equal Protection*, 74 YALE L.J. 919, 938-39 (1965).

[142] *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1955).

[143] *E.g.*, Swain v. Alabama, 380 U.S. 202 (1965).

[144] *See, e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946); Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966) (white civil rights worker successfully challenged exclusion of blacks).

[145] *E.g.*, Swain v. Alabama, 380 U.S. 202, 208 (1965); Akins v. Texas, 325 U.S. 398, 403 (1945); Billingsly v. Clayton, 359 F.2d 13, 18 (5th Cir.), *cert. denied*, 385 U.S. 841 (1966).

[146] 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967).

uated.[147] Unfortunately, the *Brooks* court emphatically reiterates the proposition that representation may not deliberately be made proportional.[148] This seems inconsistent with the basic concept of the jury as "a democratic institution, representative of all qualified classes of people"[149] and in opposition to the plain meaning of the words, "representative of a cross-section of the community."[150]

The imposition on the states of an affirmative duty to provide proportional representation on jury lists as a requirement of due process would have a great impact on another inadequacy of our system of criminal justice—one of which both lawyers and laymen are aware but which has been given little attention by legal writers[151] or the courts. This is the propensity of totally or primarily white juries, particularly but not exclusively in the South, to acquit or refuse to indict white persons suspected of crimes against blacks or other minorities.[152] Under the equal protection concept,

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147 The apparent inconsistency here disappears if the *purpose* of the constitutional position under the circumstances is considered. That is, if the effect of considering race in a given situation is to discriminate, it is unlawful. If, however, *failing* to consider race results in the *perpetuation* of discrimination, *that* is unlawful.

148 "[Awareness of race] must never, simply never, be applied to secure proportional representation. It must never, simply never, be applied to secure a predetermined or fixed limitation." 366 F.2d at 24. A rule that blacks (or any other minority) may be deliberately included, but not in deliberate numbers, seems unworkable. Note, *Constitutional Law—Jury Selection—Purposeful Inclusion of Negroes is Constitutional*, 13 WAYNE L. REV. 403, 409 (1967).

149 Fay v. New York, 332 U.S. 261, 300 (1947) (dissenting opinion). For more complete quotation, see text accompanying note 117 *supra*.

150 It should be noted that what is here proposed is not that *each jury* proportionately reflect the community, but rather that *each jury list*, from which prospective jurors are chosen at random, have proportional representation from each sub-community—socio-economic as well as racial.

151 One exception is L. MILLER, THE PETITIONERS: THE STORY OF THE SUPREME COURT OF THE UNITED STATES AND THE NEGRO 120-22, 292-93 (1967).

152 A former Ku Klux Klan leader, Samuel H. Bowers, accused of plotting to murder a black leader in Mississippi, reportedly told an ex-cohort shortly after the incident, "Don't worry . . . . No jury in Mississippi would convict somebody over killing a nigger." In two trials of Bowers, the jury was deadlocked each time. (The second jury consisted of 10 whites and 2 blacks.) San Francisco Chronicle, Jan. 26, 1969, § A, at 26, cols. 2-5.

A white San Francisco police officer was recently tried for having shot and killed a black man while off-duty. People v. O'Brien, No. CR 73512 (Super. Ct., San Francisco County, Cal., Mar. 20, 1969) (acquitted). The evidence as reported in the newspapers, although contradictory, would clearly have justified the prosecutor in asking for an indictment for first—or at least second—degree murder. The indictment was for manslaughter. San Francisco Chronicle, Nov. 2, 1968, § 1, at 1, col. 2.

It is not suggested that all white persons suspected of committing crimes against blacks have in fact committed them. But to the extent the correct result is reached in such cases, there would be more confidence in its

judicial review of jury selection is limited to those situations in which a party to the action chooses to challenge it. Where the discrimination in jury selection operates in favor of the defendant, he obviously has no reason to challenge it. If the white defendant is *convicted* by a white jury, he has no standing to challenge the exclusion of blacks from the jury where the "same class" rule has been applied. Even in the absence of the rule, there are strong social pressures against his challenging the system.[153] If, however, the state has an affirmative duty to include representation from all groups, once the due process standards are established they would prevail whether the defendant was white or black. Justice would then better serve the interests of a black victim (and a lawful society), as well as a black defendant.

**Jury Selection and Service Act of 1968**

The cross section requirement, already the law for at least the federal courts, has recently been given congressional sanction by the Jury Selection and Service Act of 1968.[154] The Act states:

> It is the policy of the United States that all litigants *in Federal Courts* entitled to trial by jury shall have the right to grand and petit juries *selected at random from a fair cross section of the community* in the district or division wherein the court convenes.[155]

The Act further provides that "all citizens shall have the opportunity to be considered for service . . . and shall have an obligation to serve . . . when summoned"[156] and forbids exclusion on grounds of "race, color, religion, sex, national origin, or economic status."[157] This declaration of policy is followed in the Act by a number of implementation provisions.

For the first time, a relatively uniform method of selecting juries is imposed throughout the federal court system. The Act requires that jurors be selected from lists of registered or actual voters, unless additional sources of names are "necessary to foster the policy and protect the rights" secured by the Act,[158] that is, where the voting lists[159] do not represent a fair cross section of the com-

correctness if the juries were not limited to whites and a few token "Uncle Toms."

153 *See* L. MILLER, THE PETITIONERS: THE STORY OF THE UNITED STATES AND THE NEGRO 120-21 (1967).

154 82 Stat. 53 (1968), *amending* 28 U.S.C. §§ 1861-69 (1964).

155 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1861 (1964).

156 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1861 (1964).

157 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1682 (1964).

158 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1863(b)(2) (1964). *See also Report of the Commission on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 360-61 (1967). The reason for including actual voting lists was that registration lists are not required by all states or are out of date. *Id.* at 360.

159 Voter lists were chosen because they were thought to be "probably the most broadly based lists available." *Report of the Commission on the*

munity. This eliminates the "key man" system and its variations as the primary source of jurors. The Act also circumscribes the jury commissioner's discretion, by making selection criteria as objective as possible and by giving the commissioners no power to deviate from these criteria.[160] The enforcement provisions of the Act permit challenges to the composition of the panel by a criminal defendant, either party to a civil action, or the United States Attorney General before the voir dire stage of trial by motions to dismiss the indictment or to stay proceedings.[161]

While the 1968 Act should be somewhat successful in reducing discriminatory jury selection in federal courts, it falls short of being fully effective. By failing to define "fair cross section of the community," it leaves this definition to the courts. This is unfortunate because the current judicial definition is vague, but clearly something less than proportional representation.[162] The Act also condones the use of voting lists as the source of jury panels, at least where there are few overt restrictions on the right to register and vote. The Act thus ignores the de facto discrimination inherent in such lists.[163] It seems likely that courts in the North and West will continue to sustain the exclusive use of voter registration lists as "beyond reproach" under the new Act,[164] at least until a right to proportional representation is accepted. And although the Act restricts the jury commissioners' discretion, it still gives courts wide latitude to excuse or exclude.[165] Perhaps the most severe shortcoming of the Act is its failure to impose federal controls on the jury selection methods of the states.[166] In short, while the 1968 Act

*Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 361 (1967).

160 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1865(b) (1964). The qualifications set forth by the Act are that the prospective juror: (1) be a United States citizen, at least 21 years old, and a resident of the judicial district for at least 1 year; (2) be able to read, write and understand English to the degree necessary to fill out the qualification form; (3) be able to speak English; (4) not be incapacitated by reason of mental or physical infirmity; and (5) not be a convicted felon or have charges pending. *See also The Congress, The Court and Jury Selection, supra* note 13, at 1139.

161 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1867 (1964).

162 See text accompanying notes 125-49 *supra*.

163 See discussion accompanying notes 38-54 *supra*. That this discrimination was intentional may be inferred from a report of the Judicial Conference, where the "built-in screening element" of the lists is mentioned as a virtue because of the subsequent restrictions on grounds for disqualifying jurors. *Report of the Commission on The Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 362 (1967).

164 *See, e.g.*, United States v. Leonetti, 291 F. Supp. 461, 474 (S.D.N.Y. 1968). The court takes note of the new Act. *Id.* at 475 *passim*; *accord*, People v. Tripp, No. CR 14790 (Super. Ct., San Diego County, Cal., Nov. 1, 1968).

165 *See* 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1866(c) (1964).

166 Congress has the power to pass legislation ensuring nondiscriminatory jury selection by the states under the thirteenth and fourteenth amend-

may correct some of the worst inadequacies of the federal jury system, it does not ensure nondiscriminatory selection even in the federal courts, and it completely ignores the state courts.

The 1968 Act has, however, supplied momentum to the current trend in jury selection. The systematic exclusion rule and its corollaries, based on equal protection, are giving way to the cross section doctrine, the due process implications of which are emerging. To date, though, the cross section doctrine has not been interpreted as requiring proportional representation of community groups, even though this appears to be its logical and necessary conclusion.

## Some Suggested Remedies

The inadequacies and inequities of our present systems of jury selection and the legal restrictions on them are painfully clear. The systematic exclusion rule (which still applies in most states)[167] becomes even more ineffective as methods of token inclusion of minority groups become more sophisticated.[168] The cross section rule as presently interpreted by the federal courts is an improvement. What is imperative, however, is the imposition of an affirmative duty on the states to provide positive standards designed to ensure broadly based, nondiscriminatory jury selection methods. Requiring proportional representation on jury lists would probably be the most significant step toward an equitable jury system. However, weaknesses in jury selection systems could be at least partially rectified by other remedies, which might be accepted more readily and which would be desirable with or without proportional representation.

As has been noted, one of the major sources of discrimination in the present system is the virtually unlimited discretion vested in jury commissioners. It has been suggested that many of the stand-

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ments. *See* Neal v. Delaware, 103 U.S. 370 (1880) (upholding constitutionality of jury selection provisions of Civil Rights Act of 1875); Strauder v. West Virginia, 100 U.S. 303 (1880); *Ex parte* Virginia, 100 U.S. 339 (1879). *See also* South Carolina v. Katzenbach, 383 U.S. 301 (1966) (sustaining Voting Rights Act of 1965 under section 5 of fourteenth amendment).

The Jury Selection and Service Act of 1968 in draft form did contain provisions affecting the states. See Title II of the proposed bill which prohibited discrimination in state jury selection. *Report of the Commission on the Operation of the Jury System of the Judicial Conference of the United States*, 42 F.R.D. 353, 381-86 (1967). However, Title II was an inadequate model for the legislation needed. It failed to impose the cross-section requirement of Title I, for example, or to contain effective means of enforcement. *See The Congress, the Court and Jury Selection, supra* note 13, at 1084-94.

[167] *But see* Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967); Brooks v. Beto, 366 F.2d 1 (5th Cir. 1966), *cert. denied*, 386 U.S. 975 (1967) (imposing cross-section requirement on states in fifth circuit).

[168] *See* Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967). *See also* Kuhn, *supra* note 7, at 237.

ards they apply are constitutionally objectionable as being impermissibly vague.[169] Unless guidelines are reasonably clear, it may be impossible to determine whether official action conforms to the standard and to secure effective review; official error and abuse are thus undetectible.[170] One writer thinks that there may be a stronger case for applying the "void for vagueness" doctrine to criteria for jury selection than to those for voter registration or school admission.[171] As he puts it:

> Misapplication of jury selection standards is less likely to be detected, objected to, and remedied. The Negro not selected for jury duty because of bias will rarely know of it and even more rarely sue for the privilege of spending two weeks in the jury room. . . . [H]is waiver [of his right not to be excluded on racial grounds] cannot be permitted to forfeit the right of litigants and the community to a jury system free of discrimination.[172]

Another weakness in the present system is the absence of sufficient guidelines for the determination of discrimination in a given case.[173] Statistical probability theory should be used to supply the needed guidelines, since it could be used to demonstrate mathematically the probability of a particular discrepancy resulting from chance.[174] There has been only one case in which the Supreme Court gave any recognition to probability theory. It noted in *Whitus v. Georgia*[175] that where 27 percent of a jury list was black, the mathematical probability of randomly choosing jury panels so that only 7 out of 90 veniremen were black (the actual composition of the panels) was 0.000006![176]

Another desirable application of contemporary mathematical methods would be to ensure representative jury lists by the use of population analysis and sampling techniques.[177] Such techniques could be used both as a means of procuring proportionally representative lists,[178] and as a check on the representativeness of present lists. To illustrate, the need to supplement voting lists in order to

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169 *E.g.*, Kuhn, *supra* note 7, at 276-82; *The Congress, the Court and Jury Selection, supra* note 13, at 1140-51; *cf.* People v. Tripp, No. CR 14790 (Super. Ct., San Diego County, Cal., Nov. 1, 1968).

170 *Cf.* Yick Wo v. Hopkins, 118 U.S. 356 (1886); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949).

171 Kuhn, *supra* note 7, at 281.

172 *Id.* at 281-82.

173 *Id.* at 254.

174 A detailed discussion is outside the scope of this paper. *See generally* Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966).

175 385 U.S. 545 (1967).

176 *Id.* at 552 n.2.

177 Kuhn, *supra* note 7, at 263. For a more thorough discussion, see Mills, *A Statistical Study of Occupations of Jurors in a United States District Court*, 22 MD. L. REV. 214 (1962).

178 Procuring lists through the use of these techniques would be more economical than the key man system. Kuhn, *supra* note 7, at 263.

have jury lists conform to a cross section of the community, as provided for in the 1968 Jury Selection Act,[179] could be determined by comparing the lists with a statistical sampling of the community. Any undue shortcomings in the former could then be remedied by selecting supplemental sources of jurors on the basis of the gaps indicated by the comparison.

An essential reform of the jury system is the elimination of financial hardship as an excuse from jury service, as it results in the disproportionate exclusion of poor people.[180] It is inconsistent with the requirement that a jury be representative of a cross section of the community to say, as some courts have said, that there is "no objection to excusing prospective veniremen for [economic] hardship."[181] The economic burden of administering justice in accordance with constitutional standards must be underwritten by the government.[182] The payment of higher fees to those performing jury service is only a partial solution.[183] To the person who would lose his job if he were absent for several weeks, the temporary receipt of jury fees will not prevent economic hardship.[184] It is thus also necessary that employers be required by law to keep the juror's job open for him.[185] If the law further required the employer to continue to pay wages to the absent juror,[186] adequate fees (probably at lower total government expense than at present) could then be paid to those who do not have regular jobs, such as workers who are employed on a daily basis, and housewives.[187]

Discriminatory jury selection results in loss of confidence in and respect for the administration of justice.[188] This is clearly true for

[179] 28 U.S.C. § 1863(b)(2) (1964).

[180] See text accompanying notes 72-77 *supra.*

[181] United States v. Leonetti, 291 F. Supp. 461, 475 (S.D.N.Y. 1968).

[182] *Cf.* Gideon v. Wainwright, 372 U.S. 335 (1963); Griffin v. Illinois, 351 U.S. 12 (1955).

[183] The Jury Selection and Service Act of 1968 doubled the basic jury fee from ten dollars per diem to twenty dollars per diem in federal courts. 82 Stat. 53 (1968), *amending* 28 U.S.C. § 1871 (1964).

[184] Job protection is undoubtedly a major reason for the unduly small proportion of younger people on juries.

[185] *Cf.* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (state statute requiring that employees be given paid time off to vote held not to violate 14th amendment or contract clause of article I, section 10). *But cf.* Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955).

[186] *Cf.* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952).

[187] *But cf.* Heimgaertner v. Benjamin Elec. Mfg. Co., 6 Ill. 2d 152, 128 N.E.2d 691 (1955).

[187] Although the states could adopt legislation to meet these needs, Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), it seems highly unlikely that many of them will do so; federal legislation is probably a more effective and slightly more likely possibility. Congress would have power to pass such legislation under section 5 of the 14th amendment. See discussion note 166 *supra.*

[188] *See* Kuhn, *supra* note 7, at 245-47.

members of minority groups who may confront a jury as criminal defendants or parties to a civil action. Exclusion of minority groups also deprives them as individuals from one of the very few opportunities available to them to directly participate in the processes of government.[189] As was said in a recent decision:

> The realities of our society emphasize the importance of jury panels drawn from a representative cross-section of the community. . . . Litigants and witnesses come into Court from all walks of life in a highly varied community. Unless jury panels represent the same walks of life and the same pattern of cultural differences, they will be less likely to understand fully the implications of the testimony they hear and the situations they must evaluate, and less likely to bring into their deliberations the background of experience and wisdom required for a just result. Similarly, the narrower the cultural spectrum of our jury panels, the less confidence the under-represented groups will have in the courts as temples of justice.[190]

Discriminatory selection also causes a breakdown in morality and increased lawlessness in the dominant culture.[191] When juries are not representative, "[t]he injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of the courts."[192] We thus have a vital interest in seeking radical improvement in our present methods of jury selection.

*Jennie Rhine**

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189 *Id.*; Broeder, *supra* note 8, at 25-26. Broeder conducted a study of 23 jury trials, during which he interviewed, among others, the 3 black jurors on the juries. He writes that: "The account of the reactions of these [three black] jurors to their service is, for the most part, a dismal one. The chief bright spot consists in the immense gratification they derived simply from being selected to participate . . . ."

". . . [J]ury service democratizes, serving as a constant reminder that each of us has a say in the affairs of government." *Id.*

190 People v. Craig, No. 41750, at 7 (Super. Ct., Alameda County, Cal., April 18, 1968).

191 Kuhn, *supra* note 7, at 245-47. *See also* note 152 and accompanying text *supra.*

192 Ballard v. United States, 329 U.S. 187, 195 (1946).

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